BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT DENIED BY SNOHOMISH COUNTY TO WIARD H. GROENEVELD, WIARD H. GROENEVELD, Appellant, v. SNOHOMISH COUNTY, Respondent.	SHB No. 86-17 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the request for review of the disapproval by Snohomish County of a shoreline substantial development permit for shoreline stabilization on the south bank of the Skykomish River came on for hearing before the Shorelines Hearings Board; Lawrence J. Faulk, Chairman, Wick Dufford, Rodney M. Kerslake, and Robert Schofield, Members, convened at Sultan, Washington, on September 8, 1986. Mr. Dufford presided.

Appellant the applicant Wiard H. Groeneveld represented himself.

Respondent Snohomish County appeared by Carol Weibel, Deputy Prosecuting Attorney. Court Reporter Julie Lever of Allied Court Reporters recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. The Board viewed the site. From testimony heard and exhibits examined, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

The site of the proposal which gives rise to this appeal is the south bank of the Skykomish River in Snohomish County approximately 1,100 feet upstream of the Mann Road Bridge south of Sultan, bordering agricultural land owned by the appellant Groeneveld.

II

The Skykomish River is an active watercourse of high velocity capable of causing erosion of the river bank during the high water months.

III

The property adjacent to the project site on the south bank of the Skykomish River is flat, valley bottom land. The property is designated "Conservancy" by the Snohomish County Shoreline Master Program (SCSMP). This section of the river is a shoreline of statewide significance.

IV

The river bank is located within the 100-year floodway of the Skykomish River.

V

Mr. Groeneveld, proposes to place riprap composed of 1,400 cubic yards of rock along the river to protect his property from eroding. The project would begin at the head of a small overflow flood channel and progress from there down the main stream for a total of approximately 430 feet.

There is evidence of old shore protection works in the same area, now in a state of extreme dilapidation.

VI

On October 1, 1985, appellant Groeneveld applied to Snohomish County for a shoreline substantial development permit to construct the shoreline stabilization project.

VII

On January 31, 1986, a declaration of non-significance was issued for the proposal. On March 11, 1986, a public hearing was held before the County's hearing examiner. On March 26, 1986, the hearing examiner denied the shoreline substantial development permit. Feeling aggrieved by this action, appellant filed an appeal with this Board on April 28, 1986. On May 2, 1986, the Department of Ecology certified appellant's request for review. On June 17 and August 5, 1986, pre-hearing conferences were convened by this Board. Settlement was actively pursued, but was not achieved prior to hearing.

VIII

Under the SCSMP Shoreline stabilization measures are permitted in

the Conservancy Environment, subject to the provisions of the General Regulations. The General Regulations for Shoreline Stabilization and Flood Protection are set forth on pp. F-60 and F-61 of the SCSMP.

Paragraph 5, in pertinent part, reads as follows:

> Shoreline stabilization measures are allowed in floodways and density fringe areas of the base (100-year frequency) flood only when their purpose is to protect existing development or prime agricultural land or to prevent serious impairment of channel function. (Emphasis added.)

IX

The SCSMP glossary defines "Prime Agricultural Land" at page J-2, as:

> land areas of Class II and Class III soils of 240 contiguous acres or larger regardless of zoning or shoreline environment designation. Contiguous shall mean adjoining acreage regardless of ownership.

X

In evaluating Groeneveld's application, the County relied on a soil classification map of the area surrounding the project site appearing in the publication "Soil Survey of Snohomish County Area, Washington" published by the United States Department of Agriculture's Soil Conservation Service (SCS) in July of 1983. The map showed a patchwork of Pilchuk Loamy Sand (Class IV) and Puyallup Fine Sandy Loam (Class II). As depicted, there were not 240 contiguous acres of Class II and Class III soils adjoining the proposed bank protection project.

No controverting evidence as to the appropriate classification of the nearby soils was presented to the County's hearing examiner. Furthermore, there was no evidence that the proposal would protect existing development or prevent serious impairment of channel function. Therefore, the hearing examiner concluded that the proposal is inconsistent with Paragraph 5 of the SCSMP General Regulations for Shoreline Stabilization and Flood Control. This conclusion was the basis for his denial of the requested permit.

XI

Appellant concedes that the project is not for the purpose of protecting existing development. Neither does he assert that it is needed to prevent serious impairment of channel function. However, he vigorously maintains that there are at least 240 contiguous acres of prime agricultural land which would be protected by the riprap development.

The case presented to us focused on a factual issue about the proper characterization of the land which the project will protect.

XII

The soil classification system is a method for assessing the capability of lands for plant growth, with the class numbers providing a general guide to the range of plants which can readily be grown in a given area.

The SCS Soil Survey referred to above includes the following descriptions at page 68:

> Class II soils have moderate limitations that reduce the choice of plants or that require moderate conservation practices.
>
> Class III soils have severe limitations that reduce the choice of plants or that require special conservation practices, or both.
>
> Class IV soils have very severe limitations that reduce the choice of plants or that require very careful management, or both.

XIII

After the County's decision but prior to the hearing before this Board, the County urged the appellant to present evidence to allow them to review the soils question. Appellant presented to the County, on three different occasions, letters from experts regarding the soils classification, but none of these letters clearly stated that there are 240 contiguous acres of Class II or Class III land immediately adjoining the proposed riprap area.

Ultimately, however, at this Board's hearing, appellant presented two soils classification experts, both of whom expressed the opinion that more than 240 contiguous acres of class II soil are to be found adjacent to the project site. This was the first time that the County had been provided with any such unambiguous expression of expert views.

XIV

After evaluation of the expert testimony, we are persuaded to give it credence. The experts were men of impeccable credentials in the soils classification field. Both based their opinions on the conduct of field work personally performed on the property.

The level of detail of this field work was not exhaustive, but

both were firmly of the view that their observations were sufficient to form the basis for an opinion as to the proper classification. Both felt that the relevant area mapped as Class IV (Pilchuk) was wrongly classified and that Class II (Puyallup) would be a more appropriate classification.

The County presented no conflicting testimony but continued to rely on the published map.

XV

Soil types are identified by predominant characteristics, but there is substantial variability within each type. In any area mapped as one type, there is likely to be an admixture of soils fitting the description of another type. Nature has strewn the earth with a heterogenous array of coverings.

Thus, soil classification involves some degree of judgment. This knowledge lends weight to the opinion testimony on this subject.

XVI

The vegetation on the areas mapped as Pilchuk here is like the vegetation on the adjaceant fields mapped as Puyallup. There is no indication that different conservation or management practices are required on the two differently mapped areas.

XVII

On the entire record before us, we find that there are at least 240 contiguous acres of prime agricultural land adjacent to Groeneveld's proposed riprap site.

XVIII

Appellant testified that the shoreline he seeks to stabilize is gradually eroding, that the river is undermining the bank and that with each flood he is losing a little more of his farm.

He estimates that the bank has receded 50 to 60 feet since 1978. He fears a more catastrophic wash out unless action is taken soon to protect the land he owns.

The riprapping project he proposes would involve placing a wall of rock 8 to 10 feet high along the bank. The SCS has provided him with plans for the project.

XIX

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

We review this project for consistency with the Shoreline Management Act, chapter 90.58 RCW, and the implementing Snohomish County Shoreline Master Program (SCSMP).

II

The appellant bears the burden of proving that the determination by Snohomish County was incorrect. RCW 90.58.140(7).

III

No substantial development may lawfully be undertaken on the shorelines of the state unless a permit authorizing the project is

first obtained RCW 90.58.140 (2). Certain developments are, however, by statutory definition made exempt from the permit requirement. RCW 90.58.030 (3)(e).

We have reviewed the statutory exemptions and conclude that none is applicable in this case. Riprapping over the site of old but thoroughly dilapidated bank protection works does not constitute "routine maintenance and repair". The plan to arrest a pattern of gradual erosion does not represent "emergency construction." The project does not fit within the exemption for normal agricultural activities.

IV

This Board hears cases de novo on an independent record made before it and is not limited to whatever may have been considered by the permit issuing entity. San Juan County v. Department of Natural Resources, 28 Wn. App. 796, 696 P.2d 995 (1981).

The proceedings before this Board, therefore, provide an opportunity for appellants and respondents alike to present a proposal for a "second look" based, to the extent they may choose, on new or different information.

V

SCSMP Section F deals with shoreline uses. Paragraph 5 of the subpart on Shoreline Stabilization and Flood Protection Activities, quoted in Finding VIII above, limits the use of bank stabilization to one of three intended purposes. One of these is the protection of prime agricultural land.

In light of evidence presented for the first time to this Board, we conclude that the requirements of Paragraph 5 are satisfied in this case. No other inconsistency with the Shoreline Stabilization provisions of the master program or with the SCSMP generally was raised.

VI

Bank protection efforts are not in themselves contrary to the policy of the SMA. The existence of a permit exemption for emergency construction to protect property from damage by the elements, RCW 90.58.030 (3)(e)(iii), implies that construction for such purposes in less pressing circumstances is within the class of uses which can be "reasonable and appropriate" on the shorelines. RCW 90.58.020.

Therefore, unless specific adverse consequences violative of the Act's policy are likely, projects such as the proposal at issue are consistent with the underlying statute. No issue was raised on review concerning adverse environmental impacts or other effects contrary to the SMA. We hold, therefore, that appellant has met his burden to show consistency with Chapter 90.58 RCW

VII

The above Conclusions oblige us to reverse the County's denial in this case. In doing so, however, we wish clearly to disclaim any implied criticism of the manner in which the "prime agricultural land" issue was handled at the local level. On the basis of the only information available to it at the time it decided the matter, the County had no choice but to deny the application.

Moreover, after the local decision, every effort was made by the County to secure from the applicant expert evaluation and supporting data which would permit them to re-evaluate the "prime agricultural land" matter.

None of this was forthcoming until a hearing before this Board was, at length, convened.

Permit applicants should understand that on questions of this kind it is not the permit issuing entity's responsibility to do independent research on their behalf. The statute expressly gives to applicants the duty of proving to the local government that the proposed development "is consistent with the criteria which must be met before a permit is granted." RCW 90.58.140 (7).

VIII

The County urges that any decision of reversal in this case should simply remand the matter to them for further consideration, rather than instructing them to issue a permit.

The basis for this request is that the denial decision rested on a finding of inconsistancy with a single provision of the SCSMP. The County's hearing examiner did not address other aspects of the project which might prevent approval.

Our agreement with the County's request in this case could result in another local denial on other grounds which might result in another appeal to this Board. Indeed, an indefinite number of such rebounds could occur as the proposal painstakingly was subjected to separate reviews issue by issue.

Adoption of the County's approach would make possible not just a second look but perhaps a third, fourth, fifth or sixth look, all within the administrative process. We do not believe that such procedural redundancy was intended in the creation of the review mechanisms established by the SMA.

IX

The local government decision in a shoreline permit appeal to this Board functions like a pleading in an ordinary civil case. It provides notice of the grounds for denial.

The burden of proof of the applicant in seeking review cannot be to controvert all the possible, but unarticulated grounds for objecting to the application. The most an appellant of a permit denial should be required to do is meet the grounds for denial advanced by the issuing entity. See Marysville v. Puget Sound Air Pollution Control Agency, 104 Wn. 2d 115, 702 P.2d (1985).

Therefore, once review is sought, if additional grounds supporting denial are thought to exist, the local government should raise them prior to the hearing before this Board and, upon such notice, make a case on these matters at the hearing.

X

There will be cases in which a remand for further consideration of identified matters or for the performance of necessary procedures is the appropriate course for this Board to follow. See Lassiter v. Kitsap County, SHB No. 86-23 (October 29, 1986).

However, we think that the SMA requires us to avoid piecemeal review of permit decisions where possible. In the instant case we conclude that our de novo review function dictates an order putting an end to administrative review

XI

This matter should be remanded to Snohomish County to issue a permit, subject to such standard conditions as the County may impose and further, conditioned, as follows:

1. No construction hereunder shall commence unless or until a hydraulic project approval is obtained from the Department of Fisheries or Game. All construction shall conform to the provisions of such hydraulic project approval.
2. No construction hereunder shall commence unless or until a state flood control zone permit is obtained from the Department of Ecology. All construction shall conform to the provisions of such flood control zone permit.

XII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

The action of Snohomish County in denying a shoreline substantial development permit to Ward H. Groeneveld is reversed. The matter is remanded to the County for the issuance of a permit consistent with this opinion.

DONE at Lacey, Washington, this 24th day of November, 1986.

SHORELINES HEARINGS BOARD

WICK DUFFORD, Presiding Officer

11/18/86

LAWRENCE J. PAULK, Chairman

RODNEY M. KERSLAKE, Member

ROBERT SCHOFIELD, Member